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No. 91-1856

Supreme Court, U.S.
FILED
JUN 11 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

TRIPLE M DRILLING COMPANY AND
GARY MORRISON,

Petitioners,

v.

KATHRYN SEIDER, TOM HUDGINS, AND
PATRICK MORRISSEY,

Respondents.

v.

THE FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR MBANK HOUSTON, N.A.,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

On April 29, 1991, the United States District Court for the Southern District of Texas heard oral argument on Respondents' Motion for Summary Judgment. The district court's opinion was delivered from the bench. A transcript of that opinion is reproduced at tab 6 in the

Record Excerpts below and is attached hereto as Appendix A.

The final Judgment was entered on May 2, 1991 (Pet. App. 9a).

On may 14, 1991, the United States District Court for the Southern District of Texas denied Petitioners' Motion for Rehearing. The Opinion on Denial of Rehearing is reproduced at tab 4 in the Record Excerpts below and is attached hereto as Appendix B.

On February 18, 1992, the United States Court of Appeals for the Fifth Circuit, in an unpublished opinion, affirmed the district court (Pet. App. 1a-8a).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its Judgment on February 18, 1992. The Petition for Writ of Certiorari was filed on or about May 15, 1992. The jurisdiction of this Court is, therefore, invoked under 28 U.S.C. § 1254(1).

STATEMENT

In 1985, one of the Petitioners, Triple M Drilling Company ("Triple M"), obtained a revolving credit line ("Note") from MBank Houston, N.A. ("MBank"), where

Triple M maintained various operating accounts.[1] Pursuant to a security agreement, Triple M pledged certain accounts receivable to secure the Note and agreed that any Triple M deposit account at MBank could be set off against Triple M's indebtedness. Later, Triple M purchased drilling equipment from USX Corporation's Oilwell Division ("Oilwell"), financing these purchases in part by granting Oilwell a lien on Triple M's accounts receivable.

On March 3, 1987, the Note matured by its own terms. On March 25, 1987, Triple M, Oilwell and MBank executed a Subordination Agreement under which Oilwell's security interest in Triple M's accounts receivable was subordinated to MBank's security interest in those receivables (the "Subordination Agreement"). The Subordination Agreement's preamble reflects that it was designed "to induce [MBank] to extend or continue to extend credit [to Triple M] from time to time, and/or make or continue to make loans, advances, payments or other financial accommodations." Nothing in the Subordination Agreement provides for an extension of the Note or a new maturity date (Pet. App. 7a). To the contrary, the Subordination Agreement expressly reserves to MBank all of its rights against Triple M (Pet. App. 4a; C.A. Record Excerpts Tab 9, R. 78).

Subsequently, on May 15, 1987, nearly ten weeks after the Note matured, MBank exercised its right under the Note and security agreement to offset the Triple M

---

[1] The other petitioner is Gary Morrison ("Morrison"), an officer and director of Triple M. Triple M and Morrison will be collectively referred to as the "Petitioners".

deposit account against Triple M's indebtedness evidenced by the Note. In addition, MBank notified Triple M's debtors to make payments directly to MBank, a right expressly reserved under the terms of the Note and security agreement (Pet. 4-5; Respondents App. 2a, 12a-13a).

In July 1987, Triple M commenced litigation against MBank in Texas State court, alleging that MBank had orally agreed to extend the Note (the "MBank Lawsuit") (C.A. Record Excerpts R. 402, 405, 406). In March 1989, MBank became insolvent, and the Federal Deposit Insurance Corporation ("FDIC") was appointed its receiver. The FDIC as receiver removed the MBank Lawsuit to federal court and moved for summary judgment on the ground that Triple M's and Morrison's claims were barred under the doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), and under 12 U.S.C. § 1823(e) (Supp. I 1989). The FDIC was granted a final judgment in the MBank Lawsuit on December 14, 1990. On November 19, 1991, the Fifth Circuit affirmed the district court's judgment in the MBank Lawsuit (Pet. App. 4a). On May 18, 1992, this Court denied Triple M's Petition for Writ of Certiorari in the MBank Lawsuit.[2]

---

[2] Petitioners suggest that it may be appropriate to consolidate this case with the MBank Lawsuit (Pet. 1 ftnote 2). Apparently Petitioners believe that this case involves issues relating to the *D'Oench, Duhme* doctrine and 12 U.S.C § 1823(e), as did the MBank Lawsuit. Although factually related to the MBank Lawsuit, this case does not involve these legal questions. As set forth in detail herein, unlike the MBank Lawsuit, this case was not decided on the legal issues involving the *D'Oench, Duhme* doctrine or 12 U.S.C. § 1823(e).

Shortly after removal of the MBank Lawsuit, Triple M and Gary Morrison were confronted with the defenses afforded the FDIC, as Receiver for MBank, under 12 U.S.C. § 1823(e) and the *D'Oench, Duhme* doctrine. Consequently, this lawsuit was filed against MBank's former officers, Tom Hudgins, Patrick Morrissey and Kathryn Seider (collectively "Respondents"). The claims asserted against Respondents were identical to the claims in the MBank Lawsuit (Pet. App. 5a-6a).

On November 1, 1990, Respondents filed a Third Party Claim against the FDIC, as Receiver for MBank. This case was removed to federal court by the FDIC on December 17, 1990. Respondents filed a Motion for Summary Judgment on all of Petitioners' claims. The Motion for Summary Judgment was based on four separate grounds:

(1) Petitioners' claims were barred by the *D'Oench, Duhme* doctrine;

(2) Petitioners' claims had no basis on the merits;

(3) Morrison, individually, did not have standing to assert any of the claims; and

(4) Petitioners' claims were barred by the doctrines of res judicata and/or collateral estoppel.

Realizing that any alleged oral agreement to extend the Note may be subject to *D'Oench, Duhme* and § 1823(e) defenses, Petitioners argued for the first time at the hearing on the Motion for Summary Judgment that the agreement to extend the Note was contained in the Subordination Agreement. Notwithstanding this argument, Respondents' Motion for Summary Judgment was granted. Significantly, the district court did not consider

the *D'Oench, Duhme* doctrine in granting Defendants' Motion for Summary Judgment. The district court emphatically stated "I don't want to even talk about old *D'Oench, Duhme*" (Respondents App. 3a). Consequently, *D'Oench, Duhme* was not an issue at the court of appeals. Furthermore, the only reference the court of appeals made to the *D'Oench, Duhme* doctrine was in connection with the MBank Lawsuit. (Pet. App. 4a). Moreover, the court of appeals' opinion expressly states that it was not addressing the application of 28 U.S.C. § 1823 (Pet. App. 6a). The court of appeals, therefore, affirmed the district court's summary judgment.

ARGUMENT

Petitioners' primary reason for contending that this Court should grant the Petition for Writ of Certiorari is because the FDIC'S "super defenses" under the *D'Oench, Dume* doctrine and 12 U.S.C. § 1823(e) should not apply in this case (Pet. i, 5-7). Apparently, Petitioners believe that the Fifth Circuit's decision conflicts with this Court's decision in *D'Oench, Duhme v. FDIC*, 315 U.S. 447 (1942) and subsequent decisions interpreting *D'Oench, Duhme*, e.g., *U.S. v. Yazell*, 382 U.S. 341 (1966) and *Langley v. FDIC*, 484 U.S. 86 (1987) (Pet. 6-7). This Court should not grant the Petition because neither *D'Oench, Duhme* nor § 1823(e) was the basis for the decisions in the district court or the Fifth Circuit. In fact, the district court expressly stated that it did not want to hear arguments regarding *D'Oench, Duhme* and the court of appeals expressly stated that it would not address the application of § 1823(e). The Supreme Court will review issues not raised or resolved

in the lower court only in exceptional cases. *Youkam v. Miller*, 425 U.S. 1399, 234-235 (1976). This case presents no such exceptional circumstances warranting the review of either the *D'Oench, Duhme* doctrine or 12 U.S.C. § 1823(e). If this Court were inclined to review issues relating to the *D'Oench, Duhme* doctrine or 12 U.S.C. § 1823(e), then that review should have been in the MBank Lawsuit, not this case.

Petitioners implicitly concede in their Petition that 12 U.S.C. § 1823(e) may not apply to this case (Pet. 7). Nevertheless, Petitioners, for the first time in their Petition and without any supporting evidence in the record, state quite matter-of-factly that the Subordination Agreement reflecting the extension of credit complies with all of the requirements of 12 U.S.C. § 1823(e) *id.* To the contrary, Respondents deny that any of the requirements of § 1823(e) have been satisfied.[3]

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[3] 12 U.S.C. § 1823(e) provides:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this Title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such written agreement:
>
> (1) is in writing;
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution;

(Continued on following page)

Petitioners' secondary reason for contending that this Court should grant the Petition for Writ of Certiorari is a tortured attempt to claim that the Fifth Circuit decided a federal question in a way that conflicts with the Texas Supreme Court (Pet. 7-9). Petitioners contend that the mere recitals and the preamble of the Subordination Agreement constitute MBank's agreement to extend the maturity date of the Note to December 31, 1987. Apparently, Petitioners believe that this Court should grant the Petition for Writ of Certiorari because the district court refused to admit extrinsic evidence regarding the interpretation of the Subordination Agreement based on FDIC "super defenses," thus abrogating Texas law (Pet. 9). This argument is disingenuous. As previously stated, neither the district court nor the court of appeals decided this case based on the FDIC "super defenses." Furthermore, Texas contract interpretation law has not been abrogated. Under Texas law, extrinsic evidence of the parties' intent with respect to the meaning of a contract is allowed only if the contract is ambiguous. *Hettig & Co. v. Union Mutual Life Ins. Co.*, 781 F.2d 1141, 1143 (5th Cir. 1986). Determining whether a contract is ambiguous is a question of law. If the contract is not reasonably subject to more than one meaning then it is not ambiguous. *Hettig & Co. v. Union*

(Continued from previous page)

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee; and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

Mutual Life Ins. Co., 781 F.2d 1141, 1143 (5th Cir. 1986); *R&P Enterprise v. LaGuarta Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex. 1980); *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968); *Universal CIT Credit Corp. v. Daniel*, 243 S.W. 2d 154, 158 (Tex. 1951).

The district court and the court of appeals, reviewing this case de novo, determined that the Subordination Agreement was unambiguous and clearly did not contain terms extending the due date of the Note (Pet. App. 6a-7a; Respondents App. 4a-5a, 11a-12a). A significant factor in both courts' holdings was that the Subordination Agreement failed to contain the most crucial term – a new maturity date (Pet. App. 7a; Respondents App. 4a, 13a). Of further significance, was the fact that Petitioners conceded in their pleadings that they had requested an extension of the Note's maturity date and MBank expressly refused to sign an extension of the Note (Pet. App. 7a). Consequently, consistent with Texas law, the lower courts determined that the contract was unambiguous and not an agreement to extend the Note (Pet. App. 7a; Respondents App. 13a-15a).

CONCLUSION

The Petition for Writ of Certiorari should be denied because

1. Petitioners' erroneous premise that the lower courts' decisions were based upon the *D'Oench, Duhme* doctrine or 12 U.S.C. § 1823(e); and

2. consistent with Texas law, the Subordination Agreement was unambiguous and did not extend the due date of the Note.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TRIPLE M DRILLING CO., ET AL	)	CA NO. H-90-3823
VS.	)	HOUSTON, TEXAS
KATHRYN SEIDER	)	APRIL 29, 1991 2:00 P.M.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LYNN N. HUGHES

APPEARANCES:

FOR THE PLAINTIFF:	MR. DAN MCEVILY MS. CHERYL B. JETER ALEXANDER & MCEVILY FIVE POST OAK PARK 24TH FLOOR HOUSTON, TEXAS 77027
FOR THE DEFENDANT:	MR. WILLIAM VINCENT HANNIGAN MR. DONALD F. HAWBAKER WINSTEAD, SECHREST & MINICK 910 TRAVIS, STE. 1700 HOUSTON, TEXAS 77002
FOR THE RECEIVER:	MR. MICHAEL D. CONNER HIRSCH & WESTHEIMER 700 LOUISIANA 25TH FLOOR HOUSTON, TEXAS 77002
COURT REPORTER:	HERMAN CHESTER 515 RUSK, #7705 HOUSTON, TEXAS 77002 (713) 221-9580

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

[p. 2] THE COURT: THANK YOU, BE SEATED.

MR. MCEVILY.

MR. MCEVILY: GOOD AFTERNOON, YOUR HONOR.

THE COURT: ASSUMING EVERYTHING THAT TRIPLE M SAY THE INDIVIDUALS AT MCORP SAID OR DID OR DIDN'T DO IS TRUE, THERE SEEMS TO ME TO BE OBVIOUS FACTUAL OR LEGAL DEFECTS IN EACH OF THEIR CLAIMS. WE CAN START WITH THE ONE THAT IT SEEMS TO ME THAT RES JUDICATA SHOULD BAR THIS SUIT BECAUSE OF THE OTHER SUIT, SINCE THESE CLAIMS COULD HAVE BEEN BROUGHT IN THAT ACTION.

AND, OF COURSE, YES, THIS IS A PARALLEL CASE, BUT THERE'S NO FRAUD, BECAUSE THERE WAS NO MATERIAL MISREPRESENTATION OF THE PRESENT FACT ON WHICH THEY COULD REASONABLY RELY. NOTHING WAS DONE NEGLIGENTLY. WHATEVER THOSE BANKERS DID, THEY DID INTENTIONALLY. THEY DIDN'T TORTIOUSLY INTERFERE WITH ANYBODY, BECAUSE EVERYBODY THEY NOTIFIED THEY HAD A RIGHT TO NOTIFY. I'M ASSUMING AN ORAL PROMISE TO RENEW THE NOTE, BUT THAT'S NOT ENFORCEABLE. WHAT DID YOUR CLIENT GIVE FOR THE PROMISE?

MR. MCEVILY: WELL, YOUR HONOR, THAT IS WHAT MAKES THIS CASE DIFFERENT FROM THE

RUN OF THE MILL D'OENCH DHUME CASE THAT WE ARE SEEING.

THE COURT: DID YOU HEAR ME SAY D'OENCH DHUME?

I DON'T WANT TO EVEN TALK ABOUT OLD D'OENCH DHUME.

[p. 3] MR. MCEVILY: IN THIS CASE THERE WAS MORE THAN AN ORAL PROMISE TO RENEW THE NOTE OR EXTEND THE NOTE UNTIL THE END OF THE YEAR, THERE WAS A WRITTEN AGREEMENT TO DO THAT. SO THAT WHEN THE BANK OFFSET THE TRIPLE M ACCOUNT, THEY HAD NO RIGHT TO DO SO BECAUSE THE NOTE IN FACT WAS NOT OVER-DUE.

THE OTHER SUIT, OF COURSE, HAS NOT BEEN CONCLUDED, WE'RE AWAITING THE APPELLEE'S BRIEF TO BE FILED IN THAT CASE BEFORE IT'S ARGUED. AND THE POINT OF CONTENTION THERE, OF COURSE, IS SPECIFICALLY WHETHER OR NOT THERE IS A WRITTEN AGREEMENT TO EXTEND THE NOTE. IF SO, THEN –

THE COURT: WHERE DO YOU FIND A WRIT-TEN AGREEMENT TO EXTEND THE NOTE?

MR. MCEVILY: IT'S THE SUBORDINATION AGREEMENT, YOUR HONOR, BETWEEN THE BANK, TRIPLE M, AND USX OIL WELL, WHEREBY OIL WELL AND TRIPLE M GAVE UP SECURITY INTERESTS IN RECEIVABLES TO THE BANK TO GIVE THEM A SUPE-RIOR POSITION IN ORDER FOR THE BANK TO RENEW THIS NOTE, THE REVOLVING LINE OF

CREDIT NOTE UNTIL THE END OF THE CALENDAR YEAR. THAT SUBORDINATION AGREEMENT WAS SIGNED, IT WAS NOTARIZED, IT WAS RECORDED.

THE COURT: WHERE IN THE SUBORDINATION AGREEMENT DOES IT OBLIGE THE BANK TO EXTEND?

MR. MCEVILY: THE BANK AGREES THAT IN CONSIDERATION FOR RECEIVING A SUPERIOR LIEN POSITION, WHICH THEY DID NOT HAVE BEFORE, THEY AGREED TO EXTEND THE CREDIT OF TRIPLE M. OUR CONTENTION IS THE MEANING OF THAT EXTEND CREDIT IS TO EXTEND [p. 4] THE TERMS OF THE CREDIT UNTIL THE END OF THE CALENDAR YEAR, WHICH IS WHAT ALL THE PARTIES AGREED.

THE COURT: EXCEPT THAT'S NOT WHAT THE DOCUMENT SAYS. THE DOCUMENT SAYS EXTEND CREDIT. WHICH MEANS, AMONG OTHER THINGS, NOT CALLING A PAST DUE NOTE RIGHT THEN.

MR. MCEVILY: WE COULD HAVE – I DON'T CONCEDE THERE COULD BE A DISPUTE ON THAT, YOUR HONOR, HOWEVER, IT'S A FACTUAL DISPUTE THAT WE'RE ENTITLED TO HAVE A JURY ADDRESS.

THE COURT: EXTEND CREDIT DOES NOT MEAN EXTEND DUE DATE, NOT IN ENGLISH AND NOT AT LAW. AND I AM NOT GOING TO BOTHER ANYBODY BY PUTTING THEM IN THE JURY BOX TO ASK THEM DOES NIGHT MEAN DAY OR DAY NIGHT. EXTEND CREDIT MEANS EXTEND CREDIT, YOU KNOW THAT. I UNDERSTAND YOU ARE GETTING

PAID FOR THAT, BUT THAT IS A SILLY ARGUMENT THAT EXTEND CREDIT MEANS TO POSTPONE THE DUE DATE.

MR. MCEVILY: NEVERTHELESS, YOUR HONOR, THAT WAS THE SUBJECT OF THE NEGOTIATION AMONG THE THREE PARTIES. AND THE BANK –

THE COURT: THAT, I WILL TAKE THAT AS TRUE. I DON'T CARE WHETHER THE ERUPTION AT POMPEII WAS THE SUBJECT OF NEGOTIATION, WHAT I CARE ABOUT IS THE FACT THAT THERE IS NO WRITTEN AGREEMENT FOR AN EXTENTION OF THE DUE DATE OF THE NOTE. THE NOTE WAS PAST DUE WHEN IT WAS CALLED, IT WAS CALLED ACCORDING TO ITS TERMS, AND THERE IS NO WRONG THAT RESULTS FROM THAT. IT MAY HAVE CREATED A LARGE AMOUNT OF UNHAPPINESS, BUT [p. 5] IT IS NOT A TORT TO CALL A PAST DUE NOTE. IT'S NOT A TORT, LIKE FRAUD, NOT TO HONOR A GRATUITOUS REPRESENTATION THAT YOU WILL DO SOMETHING IN THE FUTURE, NOT EVEN UNDER THE LOOSEST OF TEXAS CAUSES OF ACTION IS THAT FRAUD. THERE'S NO FIDUCIARY DUTY, THERE'S NO CONTRACT, WE'VE GOT GOOD FAITH AND FAIR DEALING, THERE'S CERTAINLY NOTHING HERE THAT THERE WAS A CROSS RELATIONSHIP. DID YOUR CLIENT SIGN A NOTE FOR WHATEVER IT WAS, $7 MILLION OR $750,000?

MR. MCEVILY: REVOLVING LINE OF CREDIT.

THE COURT: AND TO THE EXTENT THAT THE BANK COLLECTED ANY MONIES FROM YOUR

DEBTORS, YOUR CLIENT'S DEBTORS, DID THEY CREDIT THAT AGAINST THE NOTE?

MR. MCEVILY: I BELIEVE THEY DID, YOUR HONOR.

THE COURT: AND DID THEY DISBURSE SOME MONEY UNDER THAT NOTE TO YOUR CLIENT?

MR. MCEVILY: WELL, THE NOTE WAS DRAWN DOWN TO THE EXTENT OF $700,000.

THE COURT: AND SO, IF YOU READ THE DOCUMENT ON ITS FACE, THEN, THE BANK FULLY PERFORMED. AND DID YOUR CLIENT PAY THAT MONEY BACK?

MR. MCEVILY: WELL, NO, YOUR HONOR, NOT ALL OF IT.

THE COURT: YOU SAY; WELL, NO AS IF THAT'S A QUESTION I SHOULDN'T HAVE ASKED ASKED. YOUR CLIENT WAS UNEQUIVOCALLY OBLIGED TO REPAY THE NOTE?

MR. MCEVILY: THAT'S CORRECT.

[p. 6] THE COURT: AND YOUR CLIENT DIDN'T?

MR. MCEVILY: THAT'S CORRECT.

THE COURT: AND YOUR CLIENT NOW WANTS THE BANK TO GIVE THEM, AND THE OFFICERS TO GIVE THEM A WHOLE LOT OF MONEY BECAUSE YOUR CLIENT DIDN'T MEET ITS OBLIGATION.

MR. MCEVILY: BECAUSE, ON THE CONTRARY, THE BANK DID NOT MEET ITS OBLIGATION.

THE COURT: NO, LET'S GO BACK; THE ORIGINAL DEAL THAT'S IN WRITING IS ABSOLUTE, THERE'S NO DISPUTE ABOUT THAT, IS THERE?

THERE'S NOTHING IN THE NOTE ABOUT ANYBODY BEING OBLIGED TO RENEW IT OR EXTEND IT OR ANYTHING?

MR. MCEVILY: NO. UNDER THE ORIGINAL TERMS OF THE NOTE, I BELIEVE THE DUE DATE WAS MARCH THE 3RD.

THE COURT: AND YOUR CLIENT DID NOT PAY THE NOTE ON MARCH 3RD.

MR. MCEVILY: BECAUSE, FOR THREE MONTHS OF NEGOTIATION WITH THE BANK – YOUR HONOR, IF I MIGHT BE HEARD.

THE COURT: NEGOTIATIONS, HAVE YOU EVER LET ANYBODY PAY A NOTE WITH NEGOTIATIONS?

MR. MCEVILY: WELL, YOUR HONOR –

THE COURT: THE ANSWER IS; NO, NEGOTIATIONS ARE NOT PAYMENT. MY QUESTION TO YOU WAS NOT WERE YOU BUSY WORKING ON ANOTHER DEAL THAT WOULD HAVE OBVIATED, MY QUESTION WAS DID YOUR CLIENT PAY THE NOTE; AND THE ANSWER IS NO.

[p. 7] MR. MCEVILY: BECAUSE THE NOTE NEVER BECAME DUE.

THE COURT: THE NOTE WAS NOT PAID BECAUSE YOUR CLIENTS WERE TRYING TO GET TO NEGOTIATE ANOTHER DEAL.

MR. MCEVILY: IT HAD BEEN DONE, YOUR HONOR.

THE COURT: NEGOTIATED.

MR. MCEVILY: PRIOR TO THE MARCH THE 3RD DATE.

THE COURT: AND, OF COURSE, THAT IS SHOWN BY A NEW NOTE THAT PAYS THIS ONE BY EXTENTION AND RENEWAL AND THIS ONE IS MARKED PAID BY EXTENTION AND RENEWAL.

MR. MCEVILY: AND THEREIN LIES THE BANK'S NEGLIGENCE, YOUR HONOR, THEY NEVER PROVIDED US THE NOTE THAT THEY AGREED TO DO.

THE COURT: WAIT A MINUTE. IF YOU NEVER GOT THE NOTE, THEN YOUR CLIENT NEVER SIGNED IT, RIGHT?

MR. MCEVILY: THAT'S CORRECT.

THE COURT: AND SO, SINCE YOUR CLIENT NEVER GAVE THEM ANOTHER NOTE, THEN THIS ONE IS STILL DUE, WHICH MEANS YOUR CLIENT OWES THE MONEY.

MR. MCEVILY: I CAN'T AGREE, YOUR HONOR, AND I WOULD REQUEST –

THE COURT: WAIT A MINUTE. IT WAS THE BANK THAT WAS SUPPOSED – THE BANK GIVES YOU

THE MONEY AND THEN THEY ARE SUPPOSED TO GIVE YOU THE PAPERWORK, TOO. AND IF THEY DIDN'T GIVE YOU THE PAPERWORK, LOAN THE MONEY, I THINK IS THEIR POSITION, THEY LOANED YOU THE MONEY AND THEY DIDN'T DELIVER YOU [p. 8] THE PAPERWORK, THAT OBVIATES YOUR CLIENT'S RESPONSIBILITY TO PAY THE NOTE.

MR. MCEVILY: WHEN THE NOTE DID NOT ARRIVE PRIOR TO MARCH 3RD WE CALLED THE BANK AND WERE CONSTANTLY ASSURED THAT IT WAS ON THE WAY. IN ADDITION TO WHICH, DURING THE PERIOD OF DECEMBER THROUGH MARCH, THE BANK WAS AWARE THAT WE HAD, I BELIEVE, IT WAS A $400,000 CALL ON STOCKHOLDERS. AND IF THEY HAD TOLD US THEY WANTED PAYMENT ON THE NOTE RATHER THAN EXTENDING IT, AS THEY HAD AGREED TO DO, THE NOTE COULD HAVE BEEN PAID. BUT THEY NEVER DID THAT. AND I FEEL SOMEWHAT AT A LOSS TO ARGUE AGAINST THIS TODAY, AND THOUGH IT MIGHT HAVE NO EFFECT, I WOULD REQUEST THE OPPORTUNITY TO BE ABLE TO FILE SOMETHING.

THE COURT: WHY WOULD YOU BE AT A LOSS?

MR. MCEVILY: WELL, YOUR HONOR, AT THE LAST CALL OF THE CASE, THE BANK WAS ALLOWED THE OPPORTUNITY TO SUBMIT A SUMMARY JUDGMENT MOTION. I WAS UNDER THE IMPRESSION THAT THAT WAS FOR THE COURT'S CONSIDERATION AS TO WHETHER OR NOT ONE WOULD BE FILED OR IF IT WOULD CHANGE THE

COURT'S MIND ABOUT SEVERING THIS CASE AND REMANDING OUR CASE AGAINST THE BANK BACK TO THE STATE COURT. AND WE WERE SPECIFICALLY DIRECTED NOT TO RESPOND TO THAT SUMMARY JUDGMENT MOTION AND WE DID NOT, NOR DID THE FDIC.

THE COURT: THE FDIC HAS NO POSITION EXCEPT –

MR. MCEVILY: ON THEIR INDEMNITY CLAIM.

[p. 9] THE COURT: THEY HAVE ADMITTED THEY INDEMNIFIED THE PEOPLE, THE CASE SHOULDN'T BE HERE, SO THEY DON'T HAVE ANYTHING TO SAY. I DON'T WANT TO HEAR FROM THEM. WHAT WOULD THEY HAVE TO SAY, THEY DON'T KNOW ANYTHING, AND ADMITTED THEIR INDEMNITY BY BEING HERE.

MR. MCEVILY: YES, SIR, BUT THEY WOULD LIKE TO STAY IN FEDERAL COURT.

THE COURT: AND YOU DON'T WANT TO STAY HERE?

MR. MCEVILY: THAT'S CORRECT.

THE COURT: SO, YOU ARE TELLING ME THIS IS THE SECOND LAWSUIT THAT YOU HAVE HAD OVER THIS DISPUTE AND YOU ARE NOT PREPARED TO DISCUSS THE MERITS?

MR. MCEVILY: I'M PREPARED, YOUR HONOR, BUT I WOULD LIKE TO HAVE THE OPPORTUNITY TO PERHAPS FILE THE ARGUMENT I'M ABLE TO COME UP WITH ON THE SPUR OF THE MOMENT.

THE COURT: AND I TOLD YOU IN MARCH NOT TO RESPOND TO IT.

MR. MCEVILY: YES, SIR.

AND WHEN WE RECEIVED THE PAPERS, WE SENT A LETTER INDICATING THAT AS A RESULT OF THAT DIRECTION WE WERE NOT RESPONDING.

THE COURT: BUT YOU HAVE HAD A MONTH TO LOOK AT THIS. WHAT DO YOU WANT TO TELL ME THAT YOU DON'T KNOW?

MR. MCEVILY: WELL, I WOULD LIKE –

THE COURT: THESE ARE ALL THE SAME ISSUES THAT WERE [p. 10] RAISED BEFORE, YOU SAID THEY'VE ALREADY FILED A BRIEF IN THE COURT OF APPEALS.

MR. MCEVILY: WE HAVE, YOUR HONOR. WE ARE WAITING FOR THEIRS.

THE COURT: IT'S YOUR PREPARATION WE ARE WORRIED ABOUT NOW. WHAT IS THE DIFFERENCE BETWEEN YOUR BRIEF AND THE COURT OF APPEALS.

MR. MCEVILY: THERE IS NONE. AND IT'S BASED ON THAT WRITTEN DOCUMENT, THE SUBORDINATION AGREEMENT.

THE COURT: THAT'S WHY I DIDN'T WANT A WHOLE LOT OF PAPERWORK, AS THIS IS A VERY SIMPLE CASE.

THE SUBORDINATION AGREEMENT IS WHAT IT PURPORTS TO BE, AND IT IS NOT WHAT IT IS ATTEMPTED TO BE MADE INTO. AND THAT IS THE ONLY CLAIM THAT COULD HAVE SURVIVED IF THE DOCUMENT HAD SAID SOMETHING OTHER THAN WHAT IT SAID. I SEE NO POINT IN PROLONGING THE MISERY OF THIS CASE. IT IS A SHADOW OF AN EARLIER ONE THAT IF YOU WOULD LIKE TO FILE A COPY OF YOUR COURT OF APPEALS BRIEF HERE, I WILL BE HAPPY TO RECEIVE IT. I DON'T DOUBT IT'S ANY DIFFERENT FROM THE ARGUMENTS THAT WERE MADE IN MARCH AND MADE TODAY. IT'S JUST, UNFORTUNATELY, CLIENTS CAN BE UNHAPPY, THEY JUST DONE DON'T A CASE. DO YOU WANT TO FILE YOUR COURT OF APPEALS BRIEF HERE?

MR. MCEVILY: WELL, I THINK I WOULD, YOUR HONOR.

THE COURT: DO YOU HAVE ONE WITH YOU?

MR. MCEVILY: UNFORTUNATELY, I DO NOT.

[p. 11] THE COURT: ALL RIGHT. WOULD YOU GET IT TO US? BECAUSE, LIKE I SAY, IT'S A SIMPLE TRANSACTION, THE PAPERWORK IS SELF-EXPLANATORY AND, UNFORTUNATELY, LIMITED, ALL OF THE TERRIBLE THINGS, ALL OF THE NOTICING THE CUSTOMERS AND THINGS WERE THINGS THEY HAD A

RIGHT TO DO IF THE NOTE WAS DUE AND THERE WAS NO NEW NOTE, UNLESS IT WAS EXTENDED.

MR. MCEVILY: THE OLD NOTE WAS EXTENDED BY THE SUBORDINATION AGREEMENT, RIGHT.

THE COURT: UNLESS THE OLD NOTE WAS EXTENDED BY THE SUBORDINATION AGREEMENT, THE OLD NOTE WAS DUE. AND IF THE OLD NOTE WAS DUE, ALL OF THE THINGS THEY DID, LIKE OFF-SET AND COLLECT FROM THE THIRD PARTIES, WAS PROPER.

MR. MCEVILY: IF THE NOTE WAS DUE.

THE COURT: IT ALL TURNS ON EXTEND CREDIT.

MR. MCEVILY: THAT'S CORRECT.

THE COURT: I'M GOING TO HOLD THAT THE EXTENT CREDIT IN THE SUBORDINATION AGREEMENT MEANS EXTEND CREDIT AND NOT EXTEND DUE DATES.

I WILL LOOK AT YOUR BRIEF IN THE COURT APPEALS AS AN INSTANT REHEARING AS SOON AS YOU CAN GET IT TO ME, BUT I THINK TRIPLE M TAKES NOTHING OF THE OFFICERS AND THE OFFICERS, THEREFORE, TAKE NOTHING OF THE FDIC. BUT IF THEY HAD OF, THEY WOULD HAVE.

THE COURT: OKAY. ANYTHING ELSE?

MR. MCEVILY: NO, SIR.

[p. 12] THE COURT: ANYTHING ELSE?

MR. HAWBAKER: NO, YOUR HONOR.

MAY WE BE EXCUSED?

THE COURT: YES, SIR. THANK YOU.

MR. MCEVILY: THANK YOU, YOUR HONOR.

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT OF THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE 5-10-91.

/s/ Herman Chester
HERMAN CHESTER
OFFICIAL COURT REPORTER

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

TRIPLE M DRILLING CO., *et al.*,	§	
	§	
Plaintiffs,	§	CIVIL ACTION
	§	H-90-3823
versus	§	
KATHRYN SEIDER, *et al.*,	§	
	§	
Defendants.	§	

OPINION ON DENIAL OF REHEARING
(Filed May 14, 1991)

As a matter of law, a subordination agreement between MBank, Triple M, and the Oilwell Division of U.S. Steel in consideration for the extension of credit is not an agreement to extend an existing parallel debt.

Signed on May 13, 1991, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States
District Judge